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5 **THE HONORABLE THOMAS O. RICE**

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8 **UNITED STATES DISTRICT COURT**  
**EASTERN DISTRICT OF WASHINGTON**

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10 DARRYL W. RISER,  
Plaintiff,

11 NO. 2:18-cv-00119-TOR

12 v.  
13 WASHINGTON STATE  
14 UNIVERSITY, DON  
HOLBROOK, BRIAN ALLAN  
DIXON, and RANDI N.  
CROYLE,  
Defendants.

15 DEFENDANTS' RESPONSE  
TO PLAINTIFF'S MOTION  
FOR ENTRY OF DEFAULT  
AGAINST DEFENDANTS  
WSU, HOLBROOK, DIXON,  
AND CROYLE– ECF 37

16 **I. INTRODUCTION**

17 Plaintiff has moved for entry of default against Defendants WSU,  
18 Holbrook, Dixon, and Croyle pursuant to Fed. R. Civ. P. 55 and LR 55.1. Because  
19 Defendants have defended against Plaintiff's Amended Complaint by filing a  
20 motion to dismiss and for a more definite statement, Plaintiff's motion should be  
21 denied.

## II. FACTUAL BACKGROUND

2 On April 26, 2018, Plaintiff Darryl Riser filed an Amended Complaint  
3 alleging various misconduct by Washington State University, Don Holbrook,  
4 Brian Allan Dixon, and Randi Croyle. ECF No. 18. The Amended Complaint was  
5 96 pages of unnumbered paragraphs and included over 350 pages of attachments.  
6 ECF No. 18-1 through 18-38. On May 23, 2018, Defendants moved for dismissal  
7 of Plaintiff's Amended Complaint for failure to comply with Fed. R. Civ. P. 8,  
8 or in the alternative an order compelling a more definite statement under Fed. R.  
9 Civ. P. 12(e) and striking redundant and immaterial portions of the filing under  
10 Fed. R. Civ. P. 12(f). ECF No. 30. On May 23, 2018, Plaintiff filed a Motion for  
11 Entry of Default against all Defendants. ECF No. 37.

### III. LEGAL ARGUMENT

13           A district court may enter a default judgment against a party who fails to  
14           plead or otherwise defend. *See* Fed. R. Civ. P. 55(a). “Failure to ‘otherwise  
15           defend’ presumes the absence of some affirmative action on the part of a  
16           defendant which would operate as bar to the satisfaction of the moving party’s  
17           claim.” *Rashidi v. Albright*, 818 F. Supp. 1354, 1355–56 (D. Nev. 1993), *aff’d*,  
18           39 F.3d 1188 (9th Cir. 1994)(citing *Wickstrom v. Ebert*, 101 F.R.D. 26, 33  
19           (E.D.Wisc.1984)). “[C]hallenges to matters such as service, venue and the  
20           sufficiency of the complaint preclude a default even if pursued in the absence of  
21           a responsive pleading.” *Id.*

1           Numerous courts have ruled that a motion to dismiss constitutes defending  
 2 an action within the meaning of this rule even if the defendants have not filed an  
 3 answer to the complaint. *See, e.g., Song v. Deeds*, 947 F.2d 951 (9th Cir.  
 4 1991)(unpublished)(citing *Wickstrom v. Ebert*, 101 F.R.D. 26, 33 (E.D. Wis.  
 5 1984)); *Fid. Mortg. Corp. v. Seattle Times Co.*, 213 F.R.D. 573, 574 (W.D. Wash.  
 6 2003)(denying plaintiff's motion for entry of default because defendant  
 7 "otherwise defended" though a motion to dismiss); *Rollins v. Pierce Cty. Corr.  
 8 Facility*, 2010 WL 3958797, at \*1 (W.D. Wash. 2010)(denying motion for default  
 9 judgment where defendants filed a motion to dismiss); *Rowland v. Prudential  
 10 Fin., Inc.*, 362 F. App'x 596, 597 (9th Cir. 2010)(court properly denied motion  
 11 for entry of default because defendants filed motions to dismiss); *Harper v. City  
 12 of Monterey*, 519 F. App'x 503 (9th Cir. 2013)(clerk properly declined plaintiff's  
 13 requests for entry of default because defendants filed motions to dismiss  
 14 plaintiff's action for failure to state a claim); *Abney v. Alameida*, 334 F. Supp. 2d  
 15 1221, 1235 (S.D. Cal. 2004)(denying motion for default where defendant filed  
 16 motion to dismiss plaintiff's legally insufficient claims).

17           Additionally, a pleading "otherwise defending" an action is not required to  
 18 be filed prior to the deadline for a responsive pleading in order to prevent an entry  
 19 of default. *See, Morales-Alfonso v. Garcia*, 2017 WL 1650222, at \*1 (D. Ariz.  
 20 2017)(denying entry of default where defendant filed an untimely motion to  
 21 dismiss); *Shuster v. Shuster*, 2017 WL 20254, at \*2 (D. Ariz. 2017) (providing  
 22 that a "clerk must enter a defendant's default only where the defendant has not

1 yet appeared and defended..”); *Hudson v. State of N.C.*, 158 F.R.D. 78 (E.D.N.C.  
 2 1994) (late filing of a Rule 12 motion cured defendant’s default and thereafter  
 3 entry of default was not appropriate).

4 Essentially, default is improper if a defendant has filed a response  
 5 demonstrating an intent to defend the action. *Direct Mail Specialists, Inc. v. Eclat*  
 6 *Computerized Technologies, Inc.*, 840 F.2d 685, 689 (9th Cir.1988); *see also*,  
 7 *Breheim v. I.R.S.*, 2013 WL 7868367, at \*1 (D. Mont. 2013)(not reported).  
 8 Furthermore, a default judgment may not be entered on a legally insufficient  
 9 claim. *See Cripps v. Life Ins. Co. of North America*, 980 F.2d 1261, 1267–68 (9th  
 10 Cir.1992) (reversing a default judgment entered on a legally insufficient claim).

11 Here, Defendants filed a motion to dismiss Plaintiff’s Amended  
 12 Complaint, or for a more definite statement. ECF No. 30. This constitutes  
 13 “otherwise defending” against Plaintiff’s allegations. Furthermore, due to  
 14 Plaintiff’s prolific filing, Defendants have filed a number of additional responses  
 15 clearly indicating their intent to defend this litigation.<sup>1</sup>

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 17 <sup>1</sup> See Defendants’ Response to Plaintiff’s Motion to Disqualify Defense  
 18 Counsel (ECF No. 28), Response to Plaintiff’s Motion to Compel Defendants to  
 19 Answer Plaintiff’s Amended Complaint (ECF No. 44), Response to Plaintiff’s  
 20 Motion to Strike Defendants’ Motion to Dismiss or for a More Definite Statement  
 21 and to Strike (ECF No. 45), Response to Plaintiff’s Motion for a More Definite  
 22 Statement Under Fed. R. Civ. P. 12(e) (ECF No. 46), Response to Plaintiff’s  
 Motion to Compel Defendants to Answer Plaintiff’s Motions for Summary  
 DEFENDANTS’ RESPONSE TO PLAINTIFF’S MOTION FOR ENTRY OF DEFAULT – ECF 37

1           Additionally, Plaintiff's claims are legally insufficient, *See* ECF Nos. 50,  
 2       51, 52, and thus default judgment would not be appropriate. Since Defendants  
 3       filed a motion to dismiss and have otherwise defended against Plaintiff's  
 4       Amended Complaint, Plaintiff's Motion for Entry of Default should be denied.

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 6           \_\_\_\_\_  
 7       Judgment (ECF No. 47), Response to Plaintiff's Motion to Sever Plaintiff's  
 8       Claims, Under Fed. R. Civ. P. 42(b) (ECF No. 48), Response to Plaintiff's Motion  
 9       for Summary Judgment on Constitutional Rights Claims (ECF No. 50), Response  
 10       to Plaintiff's Motion Regarding Breach of Fiduciary Duty, Fraud, and Extreme  
 11       and Outrageous Conduct Claims Against Defendant Holbrook (ECF No. 51),  
 12       Response to Plaintiff's Motion Regarding Defamation Per Se, Libel, and Slander,  
 13       and Intentionally Causing Emotion Distress Claims Against Defendants  
 14       Holbrook and Croyle (ECF No. 52). Plaintiff has also filed several "Notices" with  
 15       the Court. ECF Nos. 34 and 38. While Defendants disagree with the factual and  
 16       legal allegations contained in these documents, they are duplicative of the  
 17       allegations contained in Plaintiff's other motions, and Defendants have elected  
 18       to respond directly to the motions.

19           Defendants also intend to respond to Plaintiff's Motion to Recuse (ECF  
 20       No. 43) and Plaintiff's Motion to Stay (ECF No. 49). Those responses will be  
 21       filed within the timeframe provided by Local Rule 7.1. (b)(2)(B), given that  
 22       Plaintiff failed to properly note those motions on an expedited basis.

## IV. CONCLUSION

Defendants respectfully request this Court deny Plaintiff's Motion for Entry of Default Against Defendants WSU, Holbrook, Dixon, And Croyle.

DATED this 15th day of June, 2018.

**ROBERT W. FERGUSON**  
Attorney General

s/Frieda K. Zimmerman

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## PROOF OF SERVICE

I certify that I electronically filed this document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Darryl Riser  
1202 Lincoln Street  
Colton, Washington 99113  
[coldriser@gmail.com](mailto:coldriser@gmail.com)

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED this 15th day of June, 2018.

**ROBERT W. FERGUSON**  
Attorney General

s/Frieda K. Zimmerman

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